Nos. 78-575, 78-597 and 78-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION, et al.,
Petitioners,
v.
SEABOARD ALLIED MILLING CORP., et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., DIXIE-PORTLAND FLOUR MILLS, INC., SOUTHEASTERN POULTRY AND EGG ASSOCIATION AND STATES OF NORTH CAROLINA AND INDIANA IN OPPOSITION

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 570 F.2d 1349.

The decisions of the Commission (ICC Pet., Apps. D and E) are not reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on February 16, 1978. Rehearing *en banc* was sought but denied by order entered May 12, 1978. Upon applications by petitioners, Mr. Justice Blackmun extended the expiration date for filing petitions for certiorari to October 9, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2350(a).

QUESTION PRESENTED

Whether a decision of the Interstate Commerce Commission to authorize proposed rail rate increase tariffs to become effective without resolving as required by section 4(1) of the Interstate Commerce Act serious allegations of *prima facie* violations of that section was judicially reviewable.

STATUTES INVOLVED

Section 4(1) of the Interstate Commerce Act, formerly 49 U.S.C. § 4(1), now 49 U.S.C. § 10726, is reproduced in this brief at pages 2-3.

STATEMENT

This case arises from the filing by petitioning railroads with the Commission of tariffs in 1977 proposing a seasonal 20% rate increase on shipments of grain and soybeans moving to, from and within the Southeastern United States. However, as published and later authorized to become effective, the rate tariffs were permeated with violations of the long and short haul prohibition of section 4(1) of the Interstate Commerce Act:

> "(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property . . ." [1]

Contrary to the above stated requirements of section 4(1), the railroads filed no application for special relief prior to imposing the tariffs and no such relief was granted by the Commission.

These respondents filed under oath protests and petitions for suspension, and certain of them also filed original and supplemental motions to reject, pointing out the violations of section 4(1) on the face of the tariffs and providing the Commission with illustrative examples of such violations.[2] The railroads did not deny

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[1] This and all other provisions of the Interstate Commerce Act have been recodified without substantive change at 49 U.S.C. §§ 10101 *et seq.*, effective after the decision below was entered.

[2] These were not mere allegations of illegality. A substantial demonstration was made that numerous fourth section departures existed in the tariffs. Rate tariffs either do or do not contain fourth section departures and the Commission can readily determine the existence or non-existence of such violations of section 4(1) when a filing is made. It is obliged to do so by section 4(1) which flatly prohibits rates containing fourth section departures unless a "special case" is made upon application and investigation prior to effectiveness.

that the tariffs contained rates which charged more for a shorter than for a longer distance over the same routes.

In response, the Commission some seven hours before the rates were to become effective issued two orders. One (ICC Pet. App. E) in effect acknowledged that the tariffs contained or might have contained violations of section 4(1). After concluding, without further explanation, that the evidence offered "does not warrant suspension of the proposal", it merely "admonished" the railroads to remove from the tariffs violations of section 4(1), "if any". The second order (ICC Pet. App. D) only adverted to the contentions in the petition to reject, summarily concluded that "no valid reason exists for the rejection of the tariff publication matter", and denied the petition. No other findings or explanation of the Commission's action were provided as to the section 4 issue.

Nothing more was left to be done to make the rates effective and legally binding on shippers including respondents. In the Commission's own language, ". . . we will permit this temporary adjustment to become effective."

From the outset, the Eighth Circuit considered this case to be unique and not a routine discretionary failure to suspend or investigate under section 15(8).[3] The court recognized the absolute prohibition of section 4(1) had been ignored by the Commission in its failure adequately to investigate substantial charges of patent illegality under that section.

Sweeping formal distinctions or labels aside, the court of appeals concluded that the ICC action authorizing over

[3] In vacating the stay (ICC Pet. App. A) the Eighth Circuit observed that "considering the circumstances by which this case comes to us, it appears to be *sui generis*". In its decision on the merits the court limited its holding to the "peculiar circumstances" presented.

objection the tariffs to become effective, without rational findings disposing of serious fourth section allegations, was reviewable.[4] The Commission's determination to give no further consideration to charges of patent illegality under section 4(1), in the face of requests for rejection and suspension, was a final order reviewable similar to a Commission determination to terminate further consideration of environmental matters in a general revenue proceeding.[5] Section 13(1) complaints would not and could not protect shippers from abuses of the unequivocal statutory requirements of section 4(1).[6]

The court did not interfere with the Commission's discretionary functions under section 15(8) but held that, as the agency entrusted with observing and enforcing the section 4(1) prohibition, the Commission could not lawfully refuse to investigate or terminate without rational findings its pre-effectiveness investigation of serious allegations that railroad rate tariffs were *prima facie* in contravention of statutory requirements.[7]

[4] The Commission failed to make rational findings and it excused pre-existing violations with a gentle admonition for the carriers to avoid such violations. As the Eighth Circuit concluded, such avoidance would be difficult since the tariffs requiring payment of the charges were approved by the Commission and allowed to take effect as applicable and binding. (ICC Pet. App. A, p. 8a.)

[5] Citing *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 318-319.

[6] The court correctly observed that in such proceedings the burden of proof would be unfairly shifted to complaining shippers and numerous such complaints would have to be filed. Judicial review of fourth section orders exists notwithstanding sections 13(1) and 15(1) of the Act. This is a fundamental principle distinguishing this case from a routine failure to suspend or investigate.

[7] That these allegations were serious and substantial was obvious from the Commission's contorted effort in its authorizing orders to duck the issue and from the later effort by the railroads to publish corrective tariffs to cure violations they initially argued did not exist.

Although the court avoided making any determination as to whether the tariffs violated section 4(1), it held that the Commission must resolve the allegations of patent fourth section violations.[8] It therefore remanded the proceeding to the Commission with directions to complete its aborted investigation of the alleged violations, to make detailed findings, and to provide for refund of the increased charges collected under the tariffs if found unlawful.

REASONS FOR DENYING THE WRIT

This is not a routine case involving failure by the Commission to suspend or investigate a new or changed rail rate. Rather this is a unique case of blatant failure by a regulatory agency to observe plainly stated statutory requirements, in which situation courts are fully empowered to intervene to protect against such abuses of authority.[9]

Requiring the Commission to resolve through rational, detailed findings and conclusions the allegations of patent illegality of the tariffs under section 4(1) was fully consistent with the role of reviewing courts to insure the statute is applied as intended by Congress.

[8] If the court could not order the Commission to adhere to the statute, there would be no way to enforce the obligation to prevent tariffs with fourth section violations from taking effect.

[9] The power of the Eighth Circuit to correct the Commission's abuse of statutory authority is a well-established exception to the so-called *Arrow* doctrine. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 671, n. 22; *Aberdeen and Rockfish R.R.* v. *SCRAP, supra*, 422 U.S. at 317-319; *Atchison Topeka & Santa Fe Ry.* v. *The Wichita Board of Trade, et al.*, 412 U.S. 822, n. 16; see also *Oesterich* v. *Selective Service Board*, 393 U.S. 233; *Fein* v. *Selective Service System*, 405 U.S. 365; *Leedom* v. *Kyne*, 358 U.S. 184. Judicial intervention was particularly necessary here since the Commission compounded its defiance of section 4(1) with conclusory statements which could not pass the rational findings test.

Section 4(1) requirements are mandatory and nondiscretionary. The Commission's action authorizing the tariffs to become effective was final as to prerequisite compliance with that section. Such action has long been held reviewable. Moreover, the decision below, involving unique circumstances, will have little impact, if any, upon the Commission's rate review functions. It does not erode the principles established in *Arrow, supra*, or its progeny.

A. The Decision of the Eighth Circuit Was Fully Consistent With Long-Standing Case Law.

The Commission asserts that *City of Chicago* v. *United States*, 396 U.S. 162, controls this case (ICC Pet. pp. 12-16). While that decision is relevant in that, as here, the Commission there terminated by negative order an investigation,[10] this case is controlled more directly by cases holding that the prohibition of section 4(1) is absolute with relief available only after Commission investigation and findings of "special case" under the statute. *Intermountain Rate Cases*, 234 U.S. 476, 484; *United States* v. *Louisville & N. R.R.*, 235 U.S. 314; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557; *Seatrain Lines Inc.* v. *United States*, 168 F. Supp. 819, 825 (S.D.N.Y.) (three judge court); see also *Seaboard Allied Milling Corp.* v. *United States*, 309 F. Supp. 879

[10] The Commission contends it did not terminate or discontinue an investigation but that it refused to institute one under section 15(8). In view of the unusual steps it took to dispose of the fourth section allegations, including issuance of two formal orders, one of which conceded violations might exist while authorizing the tariffs to become effective, the Commission cannot accurately suggest that it conducted no investigation. The labels or formalities used are not determinative. The fact is the Commission's order authorized the tariffs and dismissed with finality the allegations that section 4(1) was being violated by the tariff publication. The Commission's attempted distinction based on *City of Chicago* is misplaced in that it relies on semantic formalities of the same type this Court rejected in that case.

(W.D. Mo.); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375. Rates filed with fourth section departures are not self-executing. They depend for their legal effectiveness upon full compliance with section 4(1) requirements and procedures.[11]

The court below was confronted with abject failure, if not refusal, by the Commission to abide by the statute. Serious, unrefuted allegations had been made that the proposed tariffs contained on their face violations of the long and short haul clause. Petitions to reject and/or suspend the tariffs had been submitted in ample time for the Commission to investigate and confirm the violations. The case was processed differently than a normal rate suspension proceeding. It was assigned to a formal docket,[12] and transferred from the Commission's employee suspension board to the full Commission which issued a formal order affirmatively authorizing the rates.[13] In response to the petition to reject, the Commission's Division 2 issued a separate denial order. As the Eighth

[11] Section 4(1) occupies a unique position in the regulatory provisions applicable to rail rates. Unlike other sections affecting such rates, it operates as a flat prohibition upon the establishment of rates which are greater for a shorter than for a longer distance over the same route in the same direction. The statutory prohibition has aptly been described as "detailed, specific, prophylactic regulation, without technical language which would require expertise in the field for its interpretation." *N.Y. Central R.R.* v. *United States*, 267 F. Supp. 619, 626 (S.D.N.Y.). Violation of the long and short haul prohibition was considered so pernicious by Congress as to warrant specific condemnation. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Har. L. Rev. 863, 884.

[12] A lead formal Docket Number 36663 was assigned by the Commission's Office of Proceedings.

[13] In a routine suspension case where the Commission allows new or changed rates to take effect over protest, it issues no order authorizing the rates to become effective and provides no explanation whatever.

Circuit found, the Commission was terminating its investigation of the section 4(1) charges.[14]

The Commission cannot disguise its dereliction of duty under section 4(1) in this case by classifying its action as a mere no-investigation decision under section 15(8). Confronted with tariffs alleged to contain numerous fourth section departures, and lacking any request for special relief from the railroads, the Commission nevertheless authorized the tariffs to become effective leaving unresolved basic issues of patent illegality under section 4(1). Under such circumstances the Commission had a duty to determine the validity of the allegations and, if confirmed, to suspend or reject the tariffs. This is because the statute forbids absolutely publication of rates in violation of the long and short haul prohibition unless (1) application is filed by the carriers seeking special relief from the prohibition, (2) the Commission conducts an investigation, (3) the Commission finds that a "special case" exists warranting relief under the statute, and (4) the Commission issues an order making adequate findings setting forth the basis for its action in granting special relief.[15]

[14] Even if the Commission's action was tantamount to a refusal to investigate, that action was final and reviewable since, as found by the court below, nothing more remained to be done to make the tariffs "operative" and place them in effect. The order was final on issues of patent illegality under section 4(1).

[15] The fourth section was not always so unbending. Prior to 1910, section 4 allowed carriers to determine initially the propriety of charging more for a shorter than for a longer distance. Violations of the long and short haul provisions were left to subsequent evaluation by the Commission after publication of such rates. However, the Mann-Elkins Act of 1910, 36 Stat. 547, changed the statutory requirement and declared such discrimination *prima facie* unlawful. The amendment placed responsibility on the Commission to determine in the first instance, prior to tariff effectiveness, whether tariffs containing violations of section 4(1) should be allowed to become effective. Such a determination is to be made only after application and a showing of a special case. See *Intermountain Rate Cases, supra*, 234 U.S. at 481-486. *Wirthmore Feeds, Inc.* v. *Baltimore & Ohio R.R.*, 221 F.Supp. 745, 747 (W.D.N.Y.).

In the absence of full compliance with each of the above requirements, action of the Commission authorizing tariffs containing fourth section departures to become effective is unlawful and subject to judicial review. *Seatrain Lines* v. *United States, supra,* 168 F.Supp. 819 at 824 ("The Commission's § 4 orders are reviewable to the extent necessary to determine whether the procedure followed by the Commission was lawful and whether on their face they disclose sufficient basis for their issuance . . ."); *Seaboard Allied Milling Corp.* v. *United States, supra,* 309 F.Supp. at 883 (". . . the order in this case is fatally defective because it is not supported by findings which show on their face 'sufficient basis for the issuance of the order.'"); *Dixie Carriers, Inc.* v. *United States,* 143 F.Supp. 844, 854 (S.D.Tex.) (three judge court) ("Variations from [section 4(1)'s] sweeping prohibitions are permitted . . . only in *special cases* . . . Before the Commission can permit what the statute forbids, at least two things must be reflected (1) . . . a special case . . . and (2) . . . an investigation . . ."). Compliance with the requirements of the fourth section falls outside of Commission action which the *Arrow* doctrine insulates from judicial review.

This Court has recently pointed out that the *Arrow* principle does not apply to circumstances where the Commission has overstepped the bounds of its authority. *Trans Alaska Pipeline Rate Cases,* —— U.S. ——, 98 S.Ct. 2053, 2058-2059, n. 17 (decided June 6, 1978) (". . . Congress did not mean to cut off judicial review for such limited purposes").[16] Precisely such judicial review has occurred here. No evasion or dilution of *Arrow* was involved.[17]

[16] Citing *Dunlop* v. *Bachowski,* 421 U.S. 560; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136; *Leedom* v. *Kyne,* 358 U.S. 184.

[17] The action of the Commission was not a no-investigation decision on rates challenged as unreasonable but was an order allowing challenged rates to become effective without making rational findings or otherwise complying with section 4(1). Although the former type action is unreviewable, the latter is reviewable as final with respect to section 4(1) compliance. The issue was compliance with pre-effectiveness requirements as to rates under section 4(1), not reasonableness capable of post-effectiveness adjudication.

Where the Commission fails to comply with section 4(1) requirements, it is well established that a party affected by such lack of compliance may seek judicial review irrespective of section 13(1) of the Act.[18] *Seatrain Lines, Inc.* v. *United States, supra,* 168 F.Supp. at 824 (". . . as to matters within the contemplation of Section 4, viz., findings 'after investigation' of 'special case' . . ., plaintiff has no further administrative remedies and the action of the Commission is final. . .") *See also, A. L. Mechling Barge Lines, Inc.* v. *United States, supra,* 376 U.S. at 385; *Seaboard Allied Milling Corp.* v. *United States, supra,* 306 F.Supp. at 883-884.[19]

The investigation that the court below ordered was not an investigation under section 15(8) but rather a threshhold one which the Commission must undertake under section 4(1) as to whether the tariff charges are greater for a shorter than for a longer distance over the same line in the same direction. Such a pre-effectiveness investigation must be made in each case where there are

[18] In cases of this nature private parties must have access to the courts to cure violations of statutory authority by the Commission. It would be manifestly unfair to require affected parties who paid illegally exacted freight charges to shoulder the burden of proof of establishing such illegality through numerous separate Section 13 cases before the agency which caused the rates to be collected. In its order set aside by the Eighth Circuit, the Commission even conceded that section 13 could protect adversely affected interests only "to a certain extent". (ICC Pet., p. 29a)

[19] Citing *Mechling,* the three judge court held that the fourth section is so sweeping as to require that where issues of discrimination and preference are raised and "brought to an adversary position" in a fourth section proceeding, the merits of such contentions must be adjudicated before an order under section 4(1) can be issued. The court would not allow the Commission to require shippers to "begin anew" by filing section 13 complaints.

contentions that the tariffs contain rates in violation of section 4(1).[20] Otherwise, the Commission risks permitting the establishment of charges in violation of that section without making required "special case" findings. Such tariffs are void *ab initio*. The requirement of the court of appeals that the Commission complete the threshhold section 4(1) investigation was, therefore, in no way an intrusion into the discretion of the Commission under section 15(8) but rather a mandate to comply with its section 4(1) obligations.[21]

B. There is No Conflict Between The Decision Below And That In Asphalt Roofing.

As found by the Eighth Circuit, the Commission was derelict in its duty under section 4(1). Section 4(1) was not involved in any way in *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 567 F.2d 994 (D.C. Cir.). The two cases are fundamentally different in that critical respect.[22]

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[20] This is not a complicated or burdensome undertaking for the Commission, and, in this case, these respondents had provided sample illustrations of representative violations to the Commission prior to its decision. As found by the Eighth Circuit, the Commission's order placed the tariffs into effect and reflected ". . . no supporting findings or a reasonable basis for so doing . . ." as to the charged violations of section 4(1).

[21] We disagree with the Commission's unjustified claim (ICC Pet., p. 15, n. 12) that the lower court was not reviewing the rejection decision. Where patent illegality is charged and rejection requested, the agency must investigate the substance of the allegations in deciding whether or not to reject. Division 2 of the Commission denied the petition to reject in this case without stating any reasons or providing a rational basis for its action. (ICC Pet. App. D)

[22] That *Asphalt* involved section 15(7) and a general revenue proposal while this case involved section 15(8) and a specific rate increase are distinctions without a material difference. The key distinction is the existence of serious fourth section issues here which were not present in *Asphalt*.

The Eighth Circuit did not acknowledge that its decision was in conflict with *Asphalt*. The D.C. Circuit held that a section 15(8) decision not to investigate (or suspend) a proposed general rate increase comes within the direction of *Arrow*. The Eighth Circuit pointed out that it did not read *Asphalt* as precluding judicial review in this case and that it disagreed if *Asphalt* were read so broadly as to hold that Commission decisions not to pursue "an investigation are under all circumstances not final decisions subject to judicial review." [23]

Since *Asphalt* did not purport to deal with issues of patent illegality under section 4(1), there is every reason to believe that the D.C. Circuit if confronted with this case would reach the same result reached by the court below. In fact the D.C. Circuit only recently cited with approval the lower court's holding in this case for the principle that ". . . Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented." *National Small Shipments Traffic Conference, Inc., et al.* v. *Interstate Commerce Commission*, No. 78-1099, slip. op. at 9 n.34 (D.C. Cir. October 26, 1978). Moreover, the opinion below was not a general declaration, at odds with *Asphalt*, that a judicial power exists to require the Commission to institute or complete investigations in other rate cases unlike this case. There is thus no conflict in the circuits.

The Eighth Circuit's holding specifically "that under the peculiar circumstances of this case" the decision not to pursue adequate investigation of section 4(1) issues

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[23] The D.C. Circuit held that ". . . the reviewability of the Commission's decision to permit the rate increase *in these proceedings* to go into effect without suspension or investigation is controlled by the cases holding the Commission's decision whether to suspend a rate increase to be reviewable." 567 F.2d at 1001-1002 (emphasis supplied). That conclusion clearly does not apply to a situation where the Commission fails to follow section 4(1) requirements which are requisite to permitting rate tariffs to become effective.

was reviewable was not only harmonious with *Asphalt Roofing* but required by existing case law.[24]

C. The Decision Below Will Not Interfere With Or Complicate Commission Rate Review Functions.

The decision below imposes no new burdens upon the Commission nor does it require a departure from existing procedures. Court intervention was required only because the railroads and the Commission did not observe the plainly stated requirements of section 4(1).

The railroads neglected to file any application for fourth section relief. Since the tariffs were alleged to be *prima facie* unlawful under section 4(1), and since no relief could be granted in the absence of an application showing a "special case", the Commission was obligated either to take action to prevent the rates from becoming effective or to make rational findings disposing of the allegations. The Commission took neither step.[25] The court below has properly required the Commission to determine, as it should have in the first place, whether the tariffs were *prima facie* unlawful and, if they were, to restore shippers to the position in which they would have been if the tariffs had never become effective. This is appropriate judicial action consistent with the requirements of section 4(1).

It can be presumed that in the future the railroads and the Commission will comply with section 4(1). Insofar

[24] To read *Asphalt* as precluding review in this case would nullify section 4(1) and would contradict long-standing precedent establishing reviewability in fourth section cases. See pp. 10-11, *supra*.

[25] The Commission's refusal to heed the section 4(1) prohibition can be explained by its zealous desire to encourage seasonal rates under new section 15(17). The tariff in this case was the first such rate filing under the new section authorizing seasonal rail rates. However, as noted by the court of appeals, section 15(17) did not modify or repeal section 4(1).

as known to counsel this is the first case since the original enactment of section 4(1) and its subsequent amendment where the Commission has attempted simply to read out of the statute the absolute prohibition of the long and short haul clause. Therefore, no handicap to the Commission's rate review functions will result if it continues, as it has for years until this case, to observe the mandatory requirements of section 4(1).

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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